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(916) 445-6158

February 16, 1983

Dear Mr.

This is in regard to your letter of January 20, 1983, to Mr. Glenn Rigby, requesting an opinion concerning your client's leasing operations.

In the agreement that you provided, the Lessee is responsible for providing transportation for the equipment and for the transportation and lodging of the four lighting technicians provided by the Lessor. It further states that the Lessee shall assume all liability for any damage to the equipment and that the Lessee shall indemnify the Lessor from and against all liability as a result of equipment and personnel performance or non-performance, excluding intentional acts by Lessor's personnel.

The Lessor agrees to provide specific equipment for the tour, to repair or replace faulty equipment as quickly as possible to minimize any delay in Lessee's schedule, to provide equipment and personnel for rehearsals, and warrants that the four lighting technicians Lessor provides are qualified to operate the equipment.

As to the technicians provided by Lessor, the agreement specifies the mode of transportation, quantity and quality of lodging, the timing and duration of meal breaks, and the amount and frequency of per diem to be paid them. All of the above costs to be paid by Lessee, in addition to the "salary" paid by Lessor.

Ex JNU

February 16, 1933

In Paragraph 4 of your letter, you emphasized that the "services provided by the technicians are 'at the direction of the Lessee.'" This is from Paragraph 2 of the Agreement. The Agreement goes on to state that the technicians, "Obie's Lighting Productions, Inc., personnel" will "set-up, maintain, and adjust the lighting system during operation." The technicians will also be "responsible for each loading and unloading of the lighting system equipment." By the construction of the agreement and its content, the Lessee can direct only the color of the lights provided, their intensity, and their location. The lighting technicians are selected, paid by, and are inferentially subject to discharge by Obie's Lighting Productions, Inc., only.

By way of analogy, the following situation is provided from a previous opinion authored by Mr. Rigby, Assistant Chief Counsel:

"Assume a person wishes to have a ditch dug. He can hire a contractor to dig on a flat fee basis, he can hire a backhoe service to dig it on an hourly basis, or he can rent a backhoe and dig it himself.

"The contractor and the backhoe service are not entitled to the inventory exemption for their backhoe ~~or~~ because they, not the customer, are using the equipment. The rental company does not use the equipment, so the inventory exemption is applicable.

"Now suppose the customer is not capable of using a backhoe. He rents a backhoe and hires an operator. This doesn't change anything because the rental company is still just renting the equipment. Also, we see no problem with a requirement that the person who operates the equipment must be an 'approved' operator provided the Lessee independently hires the operator.

"Where the Lessor provides his employee to operate the backhoe, he is acting in the capacity of a backhoe service, not a rental company. Therefore, the inventory exemption would not be available, even though the contract is called a 'rental.' (See Entremont v. Whitsell, 13 Cal. 2d 290 and 35 Ops. Atty. Gen. 48.)"

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On the surface this appears to be a situation where the "Lessee" is hiring a job done, and not just renting equipment. Accordingly, Obie's would not be entitled to the inventory exemption provided by Revenue and Taxation Code Section 129.

Very truly yours,

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Tax Counsel

GTG:fr

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